U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9046473

Date: MAR. 26, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a business analyst under the second-preference, immigrant visa classification for members of the professions holding an advanced degree. See Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the record did not establish the validity of the accompanying certification from the U.S. Department of Labor (DOL) or the Beneficiary's educational qualifications for the offered position and the requested visa classification.

In these revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit. See Matter of Ho, 19 I&N Dec. 582, 589 (BIA 1988). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. Id. Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

"[A]t any time" before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. Matter of Ho, 19 I&N Dec. at 590.

USCIS may issue a NOIR if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the petition's denial. Matter of Estime, 19 I&N Dec. 450, 451 (BIA 1987). If a NOIR response does not rebut the revocation grounds stated in the notice, USCIS properly revokes a petition's approval. Id. at 451-52.

II. THE VALIDITY OF THE LABOR CERTIFICATION

Unless containing a request for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). USCIS may invalidate a labor certification after its issuance upon finding "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." Matter of Valdez, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." Id. (citation omitted).

Here, asked on the accompanying labor certification application whether it is "a closely held corporation, partnership or sole proprietorship in which the alien has an ownership interest," the petitioning corporation indicated "No." The Director's NOIR alleges that USCIS officers "conducted additional research and found that the [Petitioner's] articles of incorporation submitted with the I-140 petition have been altered, possibly in an attempt to hide the beneficiary's ownership interest [in the company]."

The NOIR, however, lacks "a specific statement . . . of the supporting evidence." Matter of Estime, 19 I&N Dec. at 452. The NOIR does not specify the purported altered portion of the articles of incorporation or explain how the alleged alteration indicates the Beneficiary's ownership of the Petitioner. See Matter of Arias, 19 I&N Dec. 568, 570 (BIA 1988) (requiring a NOIR to contain "concrete facts" rather than "conclusory, speculative, equivocal, and . . . irrelevant" observations). The notice therefore did not adequately provide the Petitioner with an "opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval." 8 C.F.R. § 205.2(b).

The factual allegations of the NOIR do not currently support the petition's revocation based on the labor certification's invalidity. We will therefore withdraw the Director's contrary finding.

The record, however, contains substantial evidence that the Petitioner misrepresented the Beneficiary's possible ownership interest in the company. The Petitioner's prior Form I-140 petition for the Beneficiary and online state records indicate that the company's initial articles of incorporation, filed in 2001, listed the Beneficiary as the company's agent for service of process. See Cal. Sec'y of

State, "Business Search," https://businesssearch.sos.ca.gov/ (last visited Feb. 10, 2021). With this petition, the Petitioner submitted a copy of its initial articles of incorporation identifying another person as its process agent. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

In the Petitioner's home state of California, a process agent need not be a corporation's owner. See Cal. Corp. Code § 6210(b) (requiring only that an agent for service of process reside in the state and have a physical address). Online state records, however, indicate that many small, California corporations like the Petitioner designate their owners as their process agents. See Cal. Sec'y of State, "Business Search," https://businesssearch.sos.ca.gov/ (last visited Feb. 10, 2021). Thus, the Petitioner's designation of the Beneficiary as its initial process agent suggests his ownership interest in the company.

In its NOIR response, the Petitioner stated that its prior counsel altered the copy of its initial articles of incorporation to disguise the Beneficiary's identity as its process agent. The Petitioner stated that its chief executive officer (CEO) and the Beneficiary "denied any knowledge []or involvement" in the alteration. The Petitioner submitted a copy of what it described as a "State Bar complaint" against prior counsel, who reportedly died the year before the NOIR's issuance in 2018. The document, however, is a letter from the state bar association notifying the Beneficiary of its possession of his client file from prior counsel. Contrary to the Petitioner's claim, the letter does not indicate that the Beneficiary or the company filed a complaint against prior counsel. Also, in an affidavit, the Beneficiary stated that, in 2001, he declined an offer of employment by the Petitioner but agreed to be the company's agent for service of process "as a favour" to the Petitioner's CEO.

The record, however, does not fully establish the Beneficiary's lack of ownership in the Petitioner. The Petitioner's chief executive officer (CEO) declared that he has solely owned the petitioning corporation since its establishment in 2001. Copies of the corporation's stock certificate and federal income tax returns of record, however, indicate that a Pakistani company, rather than the Petitioner's president, owns all the company's stock. The record lacks evidence of who, in turn, owns the Pakistani company. If the Beneficiary owned the Pakistani company, he would have indirectly owned the Petitioner.

Also, the Petitioner's NOIR response included a 2001 document signed by the company's CEO. As the Petitioner's then sole director, the CEO authorized the Beneficiary to sign all "checks, drafts, and other instruments obligating the corporation to pay money, including instruments payable to officers or other persons authorized to sign them." These additional corporate responsibilities indicate that the Beneficiary served the Petitioner as more than a process agent and possibly had an ownership interest in the company.

The record does not fully resolve the Petitioner's ownership at the time of the filing of the labor certification application or explain the Beneficiary's additional, corporate responsibilities. We will therefore remand the matter.

On remand, the Director should issue a new NOIR explaining the lingering questions regarding the validity of the labor certification and requesting evidence of the Petitioner's ownership from its

establishment in 2001 until the present, including proof its indirect owners through the Pakistani company.

III. THE REQUIRED EDUCATION

Advanced degree professionals must hold "advanced degrees or their equivalent." Section 203(b)(2)(A) of the Act. The term "advanced degree" means:

> any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

A petitioner must also demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. Matter of Wing's Tea House, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. See, e.g., Madany v. Smith, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the content of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the primary minimum requirements of the offered position of business analyst as a U.S. master's degree or a foreign equivalent degree in business administration. The labor certification requires neither training nor employment experience. The certification also states the Petitioner's alternate acceptance of a bachelor's degree and five years of experience.

On the labor certification, the Beneficiary attested that a Pakistani university awarded him a bachelor's degree in business administration in 1994. The Petitioner submitted copies not only of the Beneficiary's 1994 bachelor's degree but also of a 2000 master of business administration (MBA) degree in his name from a Pakistani institute. The Petitioner also submitted two independent, professional evaluations of the Beneficiary's foreign educational credentials. Both evaluations conclude that the Beneficiary's Pakistani MBA equates to a U.S. bachelor's degree in business administration.

The Director's NOIR notes that neither the Petitioner's unsuccessful Form I-140 petition for the Beneficiary in 2011 nor the labor certification accompanying this petition state the Beneficiary's possession of a Pakistani MBA. The omissions cast doubt on the Beneficiary's claimed possession of the degree. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies). The apparent alteration of the Petitioner's articles of incorporation casts additional doubt on the authenticity of the MBA copy. Id.

[1] This petition's priority date is February 21, 2013, the date DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

(stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence). As the record lacked reliable evidence of the Beneficiary's educational qualifications for the offered position and the requested immigrant visa classification, the Director properly issued the NOIR on this ground.

In response to the NOIR, the Petitioner submitted an original MBA diploma that the Beneficiary purportedly obtained from the Pakistani institute after the NOIR's issuance. The Director's decision, however, does not discuss this document. A revocation decision must consider "the evidence of record at the time the decision was issued (including any explanation, rebuttal, or evidence submitted by the petitioner)." Matter of Estime, 19 I&N Dec. at 452. We will therefore withdraw the Director's decision.

On remand, the Director must consider the original degree submitted by the Petitioner in response to the NOIR. The new NOIR should also ask the Petitioner to explain why the Beneficiary omitted his purported Pakistani MBA from the prior petition and the labor certification applications. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

IV. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the Petitioner has also not established the Beneficiary's possession of the minimum employment experience required for the offered position or the requested immigrant visa classification. The record does not establish the Beneficiary's possession of a U.S. master's degree or a foreign degree equivalent. Thus, to qualify for the offered position of business analyst and the requested visa classification of advanced degree professional, the Petitioner must demonstrate the Beneficiary's possession of at least five years of post-baccalaureate experience. See 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree"). The Beneficiary's diploma, if accepted as evidence of the equivalent of a U.S. baccalaureate, indicates the issuance of his MBA degree in the spring of 2000. The Petitioner would therefore have to demonstrate the Beneficiary's possession of at least five years of experience between that date and the petition's priority date of February 21, 2013.

The Beneficiary attested on the labor certification that a textile trading company employed him in Pakistan as a business analyst from August 1994 to May 2001, and from October 2001 to November 2007. Inconsistencies of record, however, cast doubt that, after potentially obtaining the foreign equivalent of a U.S. bachelor's degree in spring 2000, the Beneficiary gained at least five following years of experience with the Pakistani company. The Beneficiary's application for adjustment of status, which he filed in May 2015, contains copies of his Form I-94, Arrival-Departure Record Card, and approval notices of later applications and petitions changing and extending his U.S. nonimmigrant visa status. These materials document the Beneficiary's continuous presence in the United States since December 2001. On the Form G-325A, Biographic Information, submitted with his adjustment application, the Beneficiary also attested to his residence in the United States since 2001. The Petitioner and the Beneficiary claim that he worked in the United States from 2001 to 2007 for a business affiliated with his former Pakistani employer. But the Beneficiary listed the same name and Pakistani address on the labor certification for his former employer both before and after 2001. Also, his nonimmigrant work visa approvals authorize him to work in the United States for the Petitioner, not for the Pakistani employer. In addition, a letter from the Pakistani company states that it employed the Beneficiary from August 1994 to May 2001 and from October 2001 to November 2007, providing

only an address in Pakistan and omitting any mention of work in the United States. Thus, contrary to the Beneficiary's attestation on the labor certification, the record would not establish his post-baccalaureate employment in Pakistan for at least five years after the spring of 2000. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

The Petitioner has not demonstrated the Beneficiary's possession of the minimum experience required for the offered position and the requested immigrant visa classification. On remand, the new NOIR should explain the evidentiary deficiencies.

If supported by the record and stating sufficient factual details, the new NOIR may allege other potential grounds of revocation. The NOIR should also provide the Petitioner a reasonable opportunity to respond to all issues with additional evidence, argument, or both. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

The NOIR's allegations do not currently support the petition's revocation. The record, however, does not establish the validity of the accompanying labor certification or the Beneficiary's possession of the minimum education or experience required for the offered position and the requested immigrant visa classification.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.